Government Ordinance which came into force in 1957 the owner was liable only if the person who actually commenced or carried out the work was not known or could not be found. Under the Local Government Integration Ordinance now in force the person liable is not the owner but the person who actually carried out the work and by section 179 of that Ordinance the defendants in this case are not now liable to a fine or penalty as a complaint was not made within the prescribed period of three years next after the date of the commission of the offence.

It was argued that in determining whether the plaintiff was entitled to possession under section 15(1)(h) of the Ordinance the court must look at the facts existing at the time the contractual tenancy was terminated, namely, on the 31st October, 1964, or at the time when the writ was issued, namely, the 1st March, 1965, and that on neither of these dates was the plaintiff exposed to any penalty, fine or forfeiture.

In support of this proposition reliance was placed on *Zbytniewski* v. *Broughton.*[3] This case turned on the construction of section 65(1) of the Housing Act, 1936 which provides that where a dwelling house is overcrowded in such circumstances as to render the occupier thereof guilty of an offence, nothing in the Rent and Mortgage Interest Restriction Acts, 1920 and 1933, shall prevent the landlord from obtaining possession of the house. It was held that on the true construction of section 65(1) the restriction on recovery of possession imposed by the Rent Acts was removed only while an offence of overcrowding continued; in that case there was not overcrowding "in such circumstances as to render the tenant guilty of an offence" within section 65(1) at the date which was the material date, namely, the date of the trial, and accordingly the landlord was not entitled to possession but as Hodson L.J. pointed out at p. 357 " . . . the whole purpose of that Part of the Act has to do not with the assistance of landlords or with the protection of tenants but with the prevention of overcrowding."

In the present case the trial judge dealt with the point in this way. He said:—

"The object of the Rent Control Ordinance is to fetter landlords and take away their common law rights and not to afford the tenant a statutory defence. In my view immediately a tenant commits a breach of any written law regulating any business carried on upon the premises or of any provision of the Municipal Ordinance or any Rule or By-law made thereunder affecting the premises he removes the fetter on the landlord's right to recover possession and he loses the protection of the Ordinance and the landlord's right of action for recovery of possession arises."

Support for this view, with which I agree, is found in *Chung Lai Heng* v. *Murugappa Chettiar* [4] and *Ang Ah Bak* v. *S.E.A.C. Co.*,[5] which was upheld by the Federal Court.

Once the defendants committed a breach as outlined in section 15(1)(h) of the Ordinance they immediately lost the protection given them by the Ordinance and laid themselves open to ejection by the plaintiff bank which may at any time thereafter determine the contractual tenancy and recover possession of the premises from the defendants.

I think perhaps I should add that exposure to a penalty, fine or forfeiture means that there must be exposure to conviction, exposure to prosecution is not enough, and there is no exposure to conviction unless facts exist which would support a conviction. This was made clear in the Federation Court of Appeal decision in *Hooi Chuk Kwong* v. *Lim Saw Choo* [6] which on this point dissented from the judgment of Whitton J. in *Sarah Cashin* v. *Goh Kah Seng, supra.*

The trial judge appreciated this position because he arrived at the conclusion, with which I agree, that the breaches committed by the defendants would, if made out in proceedings against the plaintiff, lead to its conviction which would in its turn lead to a penalty, fine and forfeiture.

There was no substance in the other points argued on behalf of the appellants.

For these reasons, in my view, the decision of the trial judge was right and the appeal must be dismissed with costs.

Wee Chong Jin C.J. and **Tan Ah Tah F.J.** concurred.

Appeal dismissed.

Solicitors: *Oehlers & Choa; Elias Bros.*

ATTORNEY-GENERAL at & by the relation of PESUROHJAYA IBU KOTA*, KUALA LUMPUR v. WAN KAM FONG & ORS.

[O.C.J. (Raja Azlan Shah J.) April 8, 1967]

[K.L. — Civil Suit No. 169 of 1967]

Practice and Procedure — Relator action — Attorney-General — Whether has power and competent to act as plaintiff at the relation of Pesurohjaya, Ibu Kota, Kuala Lumpur — Whether proper person to institute proceedings — Consent of relator — Failure to file, at time of filing writ — Relator a corporation sole — Consent not sealed — R.S.C. 1957, O. 16 r. 20 — Federal Capital Act, 1960, s. 4.

Constitutional Law — Attorney-General — Powers and duties of — Relator action to remedy a public wrong — Malaysia Constitution, arts. 145, 160 & 162.

The defendants were alleged to have committed breaches of certain bye-laws by carrying on a restaurant business without a licence being issued by the Pesurohjaya. In respect of these breaches they were twice prosecuted, convicted and fined. In spite of these convictions they have persisted in carrying on their restaurant business without a licence. To restrain them from further committing these breaches the Attorney-General

* Commissioner of the Federal Capital.

at the relation of the Pesurohjaya commenced this action claiming *inter alia* a perpertual injunction restraining the defendants from using, causing or permitting the mezzanine floor to be used as a restaurant without the licence of the Pesurohjaya.

In this application the defendants sought to set aside the specially endorsed writ on the grounds that the Attorney-General (1) had no power and was not competent to act as plaintiff at the relation of the Pesurohjaya, and (2) was not the proper person to institute the proceedings. The defendants relied on article 145 of the Constitution for the first limb of their objection, and on the second limb they contended that for the consent of the relator to be valid it must be filed at the time of filing of the writ. In the instant case the writ was filed on February 18, 1967 but the consent of the relator was filed on March 29, 1967. It was also contended that since the Pesurohjaya is a corporation sole, his consent must be under seal.

Held: (1) the Attorney-General can bring a relator action to remedy a public wrong;

(2) in order to give validity to the use of the relator's name in an action his prior written consent to act as such must be filed at or before issue of the writ. Such consent is a condition precedent to the right to use the relator's name; it goes to the root of the matter for without it the nominal plaintiff has no *locus standi;*

(3) as the Pesurohjaya is a corporation sole he must use his seal in the prescribed manner when giving his consent, the absence of which makes it inoperative and of no effect; the application should therefore be allowed with costs.

Case referred to:—

(1) *Attorney-General* v. *Bastow* [1957] 1 All E.R. 497.

APPLICATION.

Yong Pung How for the plaintiff.

Ng Ek Teong and *R. Padmanabhan* for the defendants.

Cur. Adv. Vult.

Raja Azlan Shah J.: This is an application by the defendants to set aside the specially endorsed writ on the grounds that the Attorney-General has no power and is not competent to act as plaintiff at the relation of the Pesurohjaya, Ibu Kota, Kuala Lumpur, and that the Attorney-General is not the proper person to institute the proceedings.

Briefly, the facts are that the defendants are alleged to have committed breaches of certain bye-laws by carrying on a restaurant business without a licence being issued by the Pesurohjaya. In respect of these breaches they were twice prosecuted, convicted and fined in the magistrate's court. In spite of these convictions the defendants have persisted in carrying on their restaurant business without a licence. To restrain the defendants from further committing these breaches an action has been commenced by the Attorney-General at the relation of the Pesurohjaya, claiming *inter alia* a perpetual injunction restraining the defendants from using, causing or permitting the mezzanine floor to be used as a restaurant without the licence of the Pesurohjaya.

Mr. Ng Ek Teong, on behalf of the defendants, submits that article 145 of the Constitution which creates the office of the Attorney-General does not empower him to bring this relator action. Article 145(2) enacts:—

> "It shall be the duty of the Attorney-General to advise the Yang di-Pertuan Agong or the Cabinet or any Minister upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Yang di-Pertuan Agong or the Cabinet, and to discharge the functions conferred on him by or under this Constitution or any other written law".

If the contention of Mr. Ng Ek Teong truly represents the law of this country, it would be deplorable. It would mean that the Attorney-General who is the guardian of public rights is not competent to bring a relator action to restrain interference with a public right or to abate a public nuisance or to compel the performance of a public duty. Nothing could be more unjust.

Historically, "relator" was the name given to a plaintiff in an information in Chancery where the rights of the Crown were not immediately concerned and who was responsible for costs; he must have given the solicitor a written authority to file the information. That was enumerated in the statute 1852, 15 & 16 Vict. c. 86, section 11, which reads:—

> "XI. Before the Name of any Person shall be used in any Suit to be instituted in the said court as Next Friend of any Infant, married Woman, or other Party, or as Relator in any Information, such Person shall sign a written Authority to the Solicitor for that Purpose, and such Authority shall be filed with the Bill, Information, or Claim".

For the former information in Chancery an action was substituted by O. 1, r. 1 of the Rules of the Supreme Court, 1883 (U.K.) but the term "relator" is still in use as meaning the person responsible for costs at whose suggestion an action is commenced by the Attorney-General. "Relation action" was contained in O. 16, r. 20 (U.K.) and that is now embedded in O. 15, r. 11 of the Rules of the Supreme Court, 1965 (U.K.). The procedure to be followed in this country is contained in O. 16, r. 20. Although that rule differs from the English provisions in only one aspect, that is, with regard to the written authority to be given to the solicitor, I have not the slightest doubt that the meaning to be attributed to the word "relator" appearing therein is taken from the English meaning.

It is conceded that the right of the Attorney-General in the United Kingdom to bring such an action at the instance of a relator is derived from the common law and that he has an unfettered discretion to determine whether he should bring such an action. It is also a common ground that the present case, that is, the infringement of a local authority bye-law, would favourably found

an action for an injunction in the United Kingdom by the Attorney-General at the relation of the local authority (see *Attorney-General* v. *Bastow.*[1]

Section 3(1) of the Civil Law Ordinance, 1956, requires the courts *inter alia* to "apply the common law of England at the date of the coming into force of this Ordinance", that is, on 7th April, 1956. It therefore follows that before Merdeka Day the English common law power of the Attorney-General to bring a relator action is vested in him. Section 3 is an existing law within the meaning of article 160. Article 162 provides *inter alia* that the existing laws, until repealed by the proper authority, continue to be in force on or after Merdeka Day. That article therefore preserves the provisions of section 3 of the Civil Law Ordinance and section 3 is a written law which confers on the Attorney-General the English common law power to bring a relator action.

Mr. Yong Pung How on behalf of the plaintiff supports his claim that the Attorney-General in this country can bring a relator action to remedy a public wrong by referring to O. 16, r. 20 of the Rules of the Supreme Court which provides:—

"Before the name of any person shall be used in any action as next friend of any infant, or other party, or as relator, such person shall sign a consent to act as such next friend and such consent shall be filed".

He contends that these Rules of the Supreme Court, although made before Merdeka Day, came into force after Merdeka Day and therefore the reference in the rules to relator actions provides confirmation from an authoritative source that such actions continue to exist. I find the argument attractive and well-founded.

It is now convenient to deal with the second limb of Mr. Ng Ek Teong's objection, that is, the Attorney-General is not the proper person to institute the proceedings. He paraphrased his argument by saying, firstly, for the consent of the relator to be valid it must be filed at the time of filing the writ. My attention was drawn to O. 16, r. 20 (U.K.) and to the *Annual Practice* 1956 at page 272 which states:—

"On issuing a writ of summons or originating summons the authority is filed at the action department at the time of issue or filing".

In the instant case the writ was filed on 18th February, 1967 but the consent of the relator was filed on 29th March, 1967. Our O. 16, r. 20 states that "such consent shall be filed" but does not stipulate the period of filing. The English provision too does not stipulate the period of filing but the *Annual Practice, supra,* and the 2nd edition *Atkin's* Court Forms, Vol. 3, p. 24, seem to indicate that the authorisation must be filed in the registry at or before the writ or originating summons is issued. Secondly, it is submitted that since the Pesurohjaya, Ibu Kota, is a corporation sole, his consent must be under seal. In this connection reference was also made to the *Annual Practice* and *Atkin's* Court Forms.

Mr. Yong Pung How, on the other hand, contends that as these procedural defects do not go to the root of the matter they can be cured and accordingly they cannot constitute a ground for setting aside a writ which has been properly founded.

I cannot subscribe to that view. It seems to me in order to give validity to the use of the relator's name in an action his prior written consent to act as such must be filed at or before issue of the writ. Such consent is a condition precedent to the right to use the relator's name; it goes to the root of the matter for without it the nominal plaintiff has no *locus standi.*

The Pesurohjaya, Ibu Kota, is a corporation sole (see section 4(1) Federal Capital Act 1960). His powers are derived solely from statute. He has an official seal which shall be authenticated by his signature (see section 4(2)) and any document purporting to be issued or made by him duly sealed and authenticated shall in any litigation or proceeding be deemed to be so made or issued without further proof, unless the contrary is shown. It seems to me plain that the section is imperative and not subject to any implied exception. Thus the Pesurohjaya in the circumstances must use his seal in the prescribed manner when giving his consent, the absence of which makes it inoperative and of no effect.

The application is therefore allowed with costs.

Application allowed.

Solicitors: *Shook Lin & Bok; Braddell & Ramani.*

CHEE KUAN CHENG v. CHUO KONG KAH

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and Ong Hock Thye F.J.) April 12, 1967]

[K.L. — Federal Court Civil Appeal No. X.69 of 1966]

Practice and Procedure — Settlement — Consent order agreed to by counsel — Application to set aside before drawn up and entered — Whether consent given under misapprehension or misstatement of facts — Whether terms were fair or unjust.

The appellant was the defendant in a partnership action. On the second day of the trial settlement was reached between counsel on the terms agreed to by both parties. Counsel then attended the judge in chambers for an order by consent. The parties themselves did not accompany counsel into chambers when the order was made. Immediately afterwards the plaintiff repented of it and gave notice to the solicitors for the defendant and the senior assistant registrar that the order should not be drawn up or entered. The plaintiff then made an application to set aside the order contending that he had given his consent under a misapprehension. The learned trial judge after hearing argument felt it "difficult to avoid the conclusion that there might have been some